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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 696

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

Petitioner,

vs.

SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Justices of the Supreme Court of the United States:

Your petitioner, Elgin, Joliet and Eastern Railway Company, respectfully petitions this Honorable Court as follows:

1. To review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this

cause, which judgment and opinion were rendered on November 6, 1951 (R. 226, 237) and became final upon that court's denial of a petition for rehearing on January 15, 1952 (R. 238); and

2. For a writ of certiorari to the United States Court of Appeals for the Seventh Circuit for that purpose.

In support of its petition, your petitioner shows:

I.

Opinion Below.

The opinion of the Court of Appeals is reported at 193 F. 2d 348 and is set forth in full in the transcript of record at R. 226-236.

II.

Summary and Short Statement of the Matter Involved.

This is an action under the Federal Employers' Liability Act and the Federal Safety Appliance Act brought by the plaintiff as administratrix of the estate of her husband on behalf of herself and her four children to recover damages on account of his wrongful death. (R. 3, 15). Upon a former trial, there was a verdict and judgment for the defendant (R. 10) which was reversed upon appeal to this Court for the failure of the trial court properly to instruct the jury upon the application of the coupler provision of the Safety Appliance Act as construed by this Court. *O'Donnell* v. *Elgin, Joliet & Eastern Railway Co.*, 338 U.S. 384. Upon the second trial, there was a verdict and judgment for the plaintiff for $50,000 (R. 198) which the Court of Appeals affirmed (R. 237).

As this Court pointed out in its opinion on the former appeal, William O'Donnell, plaintiff's decedent "met an

unwitnessed death while working in defendant's yards as a member of its switching crew." Plaintiff contended upon both trials that her decedent was killed as the result of the breaking of a coupler, which permitted two cars to run free and strike cars standing near the place where his body was subsequently found; defendant contended that he was killed in a later and independent movement when the cars were hauled out of the yard. This Court held that the determination of this controversy was for the jury. 338 U.S. at 386. Defendant has not contended otherwise. Defendant's contentions that the plaintiff, as administratrix appointed by an Indiana court, lacked capacity to maintain this action in a district court in Illinois under Rule 17(b) of the Rules of Civil Procedure, and that the district court had no jurisdiction of this cause of action under section 6 of the Federal Employers' Liability Act, because of the absence of any concurrent jurisdiction in the Illinois state courts, decided adversely to defendant by the trial court and the Court of Appeals, have become moot in view of this Court's decision in *First National Bank* v. *United Air Lines, Inc.*, decided March 3, 1952.

The remaining contentions, presented by this petition, are based on the trial court's failure in its instructions to limit recovery on behalf of the four children to support for the period of their minority, to which defendant had specifically objected (R. 186) and to the failure of the trial court to give the following instruction requested by defendant:

> You are instructed in estimating the present cash value of any future loss of earnings, you should also consider the fact that all persons do not live to the age of expectancy, and this is particularly true in the case of hazardous occupations such as that of a railroad switchman; that they may not work during all the years of their life; that their earnings may not remain

stationary and that the reasonably to be expected earnings may vary or diminish in the future.

Upon both issues, the decision of the Court of Appeals in the case at bar is squarely in conflict with the opinion of the Court of Appeals for the Sixth Circuit in *Thompson* v. *Camp*, 163 F. 2d 396, certiorari denied, 333 U.S. 831.

III.

Jurisdictional Statement.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254. The issues involved relate to the proper measure of damages in an action based upon a federal statute, the Federal Employers' Liability Act, 45 U.S.C. §§51-60.

IV.

The Questions Presented.

The questions presented by this petition for writ of error are:

1. In an action for wrongful death under the Federal Employers' Liability Act brought on behalf of a widow and four minor children, is it reversible error to fail to limit the recovery on behalf of the children to their loss of support during the period of their minority?

2. May the court, conceding that it was error thus to fail to limit recovery, nevertheless hold *as a matter of law* that a verdict of $50,000 "when evaluated in conformity with present day conditions and when compared with verdicts in similar cases" was "reasonable" and thus deprive defendant of its right under the Seventh Amendment to have the amount of damages recoverable determined *as an issue of fact by a jury* which has been properly instructed.

3. Was it reversible error, which affected the amount of this $50,000 verdict, to refuse to give the following instruction tendered by defendant:

> "You are instructed in estimating the present cash value of any future loss of earnings, you should also consider the fact that all persons do not live to the age of expectancy, and this is particularly true in the case of hazardous occupations such as that of a railroad switchman; that they may not work during all the years of their life; that their earnings may not remain stationary and that the reasonably to be expected earnings may vary or diminish in the future."

V.

Reasons Relied Upon for Allowance of the Writ.

1. Upon the questions here presented, the opinion of the court below is squarely in conflict with the opinion of the Court of Appeals for the Sixth Circuit in *Thompson* v. *Camp*, 163 F. 2d 396. In that case, decided in 1947, where a 33 year old switchman was survived by a wife and three sons, age 10 and 13 and one born shortly after his death, and the verdict was for $35,000, the Sixth Circuit Court held that it was prejudicial error to fail to limit recovery on behalf of the children to the period of their minority and to refuse to give the identical instruction tendered here. This Court denied the administratrix' petition for certiorari to review this ruling. *Camp, admx.* v. *Thompson*, No. 472, 333 U.S. 831. In the instant case, O'Donnell was 45 years old at the time of his death, which, incidentally, occurred only six months after the death of Camp; he left a wife and four children, ages 17,[1] 15, 8 and 5; the verdict is nearly 50% higher but the same error is held to be harmless. Upon the measure of recovery on behalf of

[1] Recovery on behalf of this daughter, who has since married, was expressed disclaimed in counsel's argument to the jury. (R. 219)

the minor children, the decision below is also in conflict with the decision in the Eighth Circuit in *Chicago B. & Q. R. Co.* v. *Kelly* (C.C.A. 8), 74 F. 2d 80, 85 and with a long line of decisions of this Court and other reviewing courts cited in the *Camp* and *Kelly* cases holding that "[R]ight of recovery for these beneficiaries was limited to their minority, and the court should have so instructed." The decision of the Court of Appeals in this case stands alone against an unbroken line of authority.

2. The decision of the Court below denies the defendant its right to have the issue of damages determined as a question of fact by a properly instructed jury. The Court of Appeals held that "the refusal of the court to thus limit recovery on behalf of the children [i.e. to support during their minority] was error." 193 F. 2d at 355; R. 236. The effect which this error had on the jury's decision is, literally speaking, incalculable, but whatever it was, the defendant was entitled as a matter of law to have it altogether eliminated from the jury's consideration. Instead, the Court of Appeals substitutes its judgment for that of the jury, as to what would have been a "reasonable" verdict if the error had not been committed. In so holding, the Court of Appeals not only invaded the province of the jury—and only the jury—to decide this question, but the Court decided the issue by the application of a standard which the jury did not, and under the court's specific instruction (R. 184) was forbidden to apply, namely, comparison "with verdicts in similar cases." In deciding what was a "reasonable" verdict as a matter of law the Court of Appeals usurped a function which, under the Seventh Amendment, was exclusively that of the jury.

3. The Court of Appeals erred as a matter of law in holding the failure to limit recovery on behalf of the children was "harmless" error. A verdict for $50,000 does

not come within the *de minimus* rule. The admitted error affected the measure of recoverable damages of four of the five persons on whose behalf the action was brought; under the customary practice of the Indiana probate court to distribute the proceeds of recoveries in these cases in accordance with the Indiana law of descent (Burns' Ind. Stat. §6-2320), the children are interested to the extent of two-thirds of this judgment. The failure to state the correct rule of recovery as to four-fifths of the beneficial plaintiffs and two-thirds of the recovery cannot be dismissed as trivial.

4. With possible defenses being steadily curtailed by statutory amendments and by judicial decisions broadening the concepts of negligence, in these cases the amount of damages is becoming as important an issue as the question of liability itself, if not at least from a practical standpoint, the more important issue. Indeed, the very purpose of the law suit is to recover money damages, and as much as possible, not to adjudicate some abstract question of liability. An erroneous instruction upon the question of liability is reversible error even though the jury's verdict was not an "unreasonable" one. By the same token, an erroneous instruction on the issue of damages is not "harmless" unless the jury returns a verdict for an unreasonable amount. In view of the oft-repeated concern of federal and state courts in the rapidly increasing amount of the verdicts in these cases,[1] the need to instruct juries fairly and accurately on the damage issue is just as important to the orderly administration of justice as is the need to instruct fairly and accurately on the issues of liability, and the failure of the court below to correct an admitted error requires the exercise of this Court's power of supervision.

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[1] See **Wetherbee v. Elgin, Joliet & Eastern Ry. Co.**, C.A. 7, 191 F. 2d 302, 309; **Fritz v. Pennsylvania R. Co.**, C.A. 7, 185 F. 2d 31, 36; **Virginian Ry. Co. v. Armentrout**, C.A. 4, 166 F. 2d 400, 407.

Prayer for the Writ.

Wherefore, for the reasons above given, your petitioner respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Seventh Circuit, and that this cause may be reviewed by this Court, and the judgment appealed from be reversed.

Respectfully submitted,

HARLAN L. HACKBERT,
Attorney for Petitioner.

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No.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

Petitioner,

vs.

SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

I.

Opinion Below.

The opinion of the Court of Appeals is reported as *O'Donnell* v. *Elgin, J. & E. Ry. Co.*, C.A.7, 193 F. 2d 348.

II.

Jurisdictional Statement.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254. The issues presented involve substantial questions as to the proper measure of damages recoverable in an action under the Federal Employers' Liability Act, 45 U.S.C. §§51-60.

III.

Statement of the Case.

Following the remandment of this cause after this Court's decision on the prior appeal, *O'Donnell* v. *Elgin, J. & E. Ry. Co.*, 338 U.S. 384, plaintiff filed an amended complaint (R. 15) and the cause went to trial upon the amended complaint and answer. The jury returned a verdict for the plaintiff for $50,000 (R. 198) upon which the trial court entered judgment (R. 199). Defendant's alternative motion for new trial (R. 199) was denied (R. 203); upon defendant's appeal, the Court of Appeals affirmed the judgment (R. 237).

The issues presented by the petition for certiorari arise first upon the trial court's failure, over defendant's specific objection (R. 186)to instruct the jury that the damages recoverable on behalf of the minor children were limited to support during the period of their minority; and, second, the court's refusal to give the following instruction tendered by the defendant:

> "You are instructed in estimating the present cash value of any future loss of earnings, you should also consider the fact that all persons do not live to the age of expectancy, and this is particularly true in the case of hazardous occupations such as that of a railroad switchman; that they may not work during all the years of their life; that their earnings may not remain stationary and that the reasonably to be expected earnings may vary or diminish in the future."

The evidence material to a consideration of these issues was as follows:

William O'Donnell was 45 years old at the time of his death (R. 139). He left surviving him a widow and four children, Elizabeth, age 20, William, Jr. age 15, Marlene Catherine, age 7, and Richard, age 6. At the time of the second trial, the widow was 46, Elizabeth was 25 and married (and recovery on her behalf was disclaimed in counsel's argument to the jury; R. 217), William, Jr. was 20 and the younger children were 11 and 10. (R. 139, 141). He had worked as a switchman for the defendant for twenty-three years (R. 48, 139); although qualified as a conductor or switch foreman (R. 48) he had worked the last two years as a switchman in the crew of which his brother was foreman. (R. 48, 52, 58). This crew worked from 4:00 P.M. to midnight, switching cars in the defendant's car repair yards at Gary, Indiana, switching out the cars upon which repairs had been completed and setting back the unrepaired cars. (R. 25, 28, 62-64). His gross earnings (not takehome pay) for the years 1942 to 1945 ranged from thirty-three to thirty-six hundred dollars (R. 140, 142).

The court's charge to the jury authorized them to consider "the pecuniary loss, if any, which you may find from the evidence that the widow and children have sustained because of being deprived of maintenance and support" and "the contribution of money or other pecuniary benefits, if any, which the evidence may show that the surviving widow and children would have received from him after the time of his death, if he had continued to live" (R. 183). Defendant's counsel specifically objected because the instruction was not limited as to the amount "allocable to the children, for their support which they would be entitled to during their minority" but the trial court overruled the objection (R. 186).

IV.

Specification Of Errors Intended To Be Urged.

Your petitioner relies here upon the error of the trial court in denying defendant's alternative motion for a new trial for the reasons specified in paragraph 6 of such motion (R. 201) and for the reasons specified in subparagraphs (d) and (3) of paragraph 3 of appellant's statement of points relied upon in the court of appeals (R. 211-212). Specifically your petitioner urges as error here:

1. The failure of the trial court, despite defendant's specific objection, to instruct the jury that recovery on behalf of the minor children was limited to loss of support during the period of their minority; and

2. The failure of the trial court to give the following instruction tendered by the defendant below:

> "You are instructed in estimating the present cash value of any future loss of earnings, you should also consider the fact that all persons do not live to the age of expectancy, and this is particularly true in the case of hazardous occupations such as that of a railroad switchman; that they may not work during all the years of their life; that their earnings may vary or diminish in the future."

Summary of Argument.

I.

The error in failing to limit recovery on behalf of the minor children to loss of support during the period of their minority was prejudicial error.

1. The better rule, sustained by reason and authority, holds that the failure so to limit the recovery in instructions to the jury is reversible error.

Thompson v. *Camp*, C.A. 6, 163 F. 2d 396;
Chicago, B. & Q. R. Co. v. *Kelley*, C.C.A. 8, 74 F. 2d 80.

2. An error which affects, as this error did, the right of recovery of four-fifths of the beneficial plaintiffs and two-thirds of the proceeds of the recovery is not trivial in its effect.

3. The holding of the court below that as a matter of law the verdict was "reasonable" despite the admitted error, deprives defendant of its right under the Seventh Amendment to have the amount of the verdict determined as a question of fact by a properly instructed jury.

Fairmount Glass Works v. *Cub Fork Caal Co.*, 287 U.S. 474;

Capital Traction Co. v. *Hof*, 174 U.S. 1.

4. The need that juries be adequately and fairly instructed on the damage issues is becoming of increasing importance in the orderly administration of justice.

II.

The failure to instruct the jury to consider the hazardous nature of decedent's employment, as affecting his work expectancy and his life expectancy, was error.

Thompson v. *Camp*, C.C. 6, 163 F. 2d 396.

ARGUMENT.

I.

The Error in Failing to Limit Recovery on Behalf of the Minor Children was Prejudicial.

The Court of Appeals recognized that the failure of the trial court in its instructions to limit recovery on behalf of the minor children to loss of support during their minority, to which the defendant had specifically objected (R. 186) was error, but held that the error was not prejudicial. This conclusion is squarely in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Thompson* v. *Camp*, C.A. 6, 163 F. 2d 396. That court based its conclusion that the failure so to instruct the jury was reversible error on reason and authority, saying:

> "Damages recoverable under the Act properly include, in addition to the loss of pecuniary benefits by the widow, the pecuniary value of what the decedent reasonably might have been expected to give his children during their minority. *Norfolk & Western R. Co.* v. *Holbrook*, 235 U.S. 625, 629, 35 S. Ct. 143, 59 L. Ed. 392. The recovery is limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss. In the absence of evidence that an adult child is either dependent upon or had any reasonable ground for expecting any pecuniary benefit from a continuance of the decedent's life, a recovery on behalf of such child is excluded. *Gulf, Colorado, etc., R. Co.* v. *McGinnis*, 228 U.S. 173, 33 S.Ct. 426, 57 L.Ed. 785; *Chicago B. & Q. R. Co.* v. *Kelly*, 8 Cir., 74 F. 2d 80, 85; *Nashville, C. & S. & L. Ry.* v. *Anderson*, 134 Tenn.

666, 682, 185 S.W. 677, L.R.A. 1918C, 1115, Ann. Cas. 1917D, 902. See also *Michigan Cent. R.R.* v. *Vreeland*, 227 U.S. 59, 69-72, 33 S.Ct. 192, 57 L.Ed. 417, Ann. Cas. 1914C, 176; *Chesapeake & O. R. Co.* v. *Kelly, supra*, 241 U.S. 485, 488, 36 S.Ct. 630, 60 L.Ed. 117, L.R.A. 1917F, 367. Appellee contends that the instruction as given did not refer to the children and limited the recovery to contributions to be reasonably expected by the wife. Although the children are not specifically mentioned, the charge refers several times to the pecuniary loss of the 'plaintiff'. The plaintiff was not the widow individually but was the widow as Administratrix of her husband's estate. The last paragraph of the complaint seeks recovery for 'the other dependents of Ervin Camp.' Mrs. Camp testified that Camp turned over to her his entire earnings and that it took all, or practically all, of it to support herself, her husband and the children. The evidence regarding the amount of the annuity was based on the assumption that part of his salary was used for the support of the children. In view of this background, we believe it was prejudicial error not to give the requested instruction. The evidence and the lump sum verdict provide no criterion for segregation of the recovery into different parts which would permit that a remittitur be ordered for the purpose of correcting the error. *New York Central & S. & L. R. Co.* v. *Niebel*, 6 Cir., 214 F. 952."

This court denied certiorari. *Camp, admx.* v. *Thompson*, No. 472, 333 U.S. 831. The same conclusion was reached, again based on reason and authority, by the Eighth Circuit Court of Appeals in *Chicago, B. & Q. R. Co.* v. *Kelley*, C.C.A. 8, 74 F. 2d 80, 85, where the court said:

"The court also instructed the jury that, if they found in favor of plaintiff, it would be their duty to 'fix the amount of her recovery and in doing so you may allow her, in your verdict, for the use and benefit of herself, as wife, and her minor children, such

sum as in your judgment, under the proof, will be just compensation for the pecuniary loss they have sustained by reason of the death of the deceased. In estimating such sum you should consider the age of the deceased, together with his capacity for earning money, his disposition to contribute, to care for, and to furnish his wife money, as shown by the evidence, the ages of the children and the probable expectation of life of the parties concerned.' It is contended that this instruction permitted the jury to award damages on account of contributions which they believed the deceased might have made, had he lived, to the children after they had attained their majority. Proper exceptions were taken to the instruction, calling it to the attention of the court.

"There was no evidence from which the jury could have found any expectation of support for the children after majority. The instruction does not clearly limit the recovery for them to minority, but the last part of the instruction permits consideration of the ages of the children and their probable expectation of life. Right of recovery for these beneficiaries was limited to their minority, and the court should have so instructed. *Chesapeake & O. R. Co.* v. *Kelly*, 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117; *Hines, Director General* v. *Walker* (Tex. Civ. App.), 225 S.W. 837; *Nashville, C. & St. L. Ry. Co.* v. *Anderson*, 134 Tenn. 666, 185 S.W. 677, L.R.A. 1918C, 1115, Ann. Cas. 1917D, 902."

In that case, as in the *Camp* case, the failure so to instruct the jury was held prejudicial and reversible error.

The court below, however, without citation of authority and with no other reason than stated, held that the admitted error here was not such prejudicial error as to require reversal because when the verdict was "evaluated in conformity with present day conditions and when compared with verdicts in similar cases, it was reasonable." In thus substituting its judgment for that of a properly instructed jury, the court committed serious error.

In the first place, the effect of the error in failing properly to limit the jury is not to be dismissed as trivial. A verdict of $50,000 in a wrongful death case—a verdict for five times the amount permitted under the law of the state where the accident occurred (Burns' Indiana Statutes, 1946 Replacement, §2-404) and more than six times the amount then recoverable by the dependents of an industrial employee (Burns' Indiana Statutes, §40-1405) does not come within the *de minimus* rule. The trial court's error affected the amount recoverable by four of the five persons for whose benefit the action was brought. We are familiar from other cases with the prevailing practice of the Indiana probate court to distribute the proceeds of a recovery in a case such as this in accordance with the Indiana statute of descent (Burns' Indiana Statutes, §6-2320), in other words, one-third to the widow and two-thirds to the children. An error which affects the measure of damages recoverable by four-fifths of the beneficial plaintiffs and two-thirds of the total recovery cannot be said as a matter of law to have been of no effect.

Except under special circumstances not revelant here, the determination of the amount of damages recoverable is a question of fact for a jury; the Court of Appeals may not substitute its judgment for what a jury might have or should have done, without violating the right of trial by jury secured by the Seventh Amendment. *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474. The Court of Appeals here did not confine itself to the question of law before it—whether the trial court had erroneously instructed the jury—but went on to decide that the verdict was one which the jury should have returned anyway. But what were the damages sustained by these children during their minority was a question of fact for a properly instructed jury to determine, not a question of law for deci-

sion by a reviewing court. The Seventh Amendment protects defendants as well as plaintiffs. It was for a jury instructed in accordance with law to determine as a matter of fact what was reasonable, not for the court to decide as a matter of law. And the jury must decide that issue upon the *evidence* before it; this jury was specifically instructed that "you should not be influenced at all by newspaper or other accounts of the outcome of any other trial, or by the reports of any other judgment or settlement of which you may have heard." (R. 184). The standard which the Court of Appeals applied to test the "reasonableness" of this verdict—"when compared with verdicts in similar cases"—was one which the jury could not have applied either under the law or the evidence, and we submit that the Court of Appeals cannot substitute its judgment, based on a false standard, for the judgment of a properly instructed jury.

Finally, we submit that the "reasoning" of the Court of Appeals, if it may be called that, that a clear error affecting the vital question of damages may be ignored unless the verdict returned is "unreasonable" in amount sets a possible precedent so dangerous and far-reaching in its effect as to require the exercise of this Court's power of supervision to assure defendants as well as plaintiffs of a fair trial of the issue of damages under established rules of law. With the defenses normally available in negligence actions severly curtailed by the 1939 amendment, and with the broadening concept of the doctrine of negligence in recent years, the damage issue is becoming increasingly of greater importance even than the question of liability. These suits are filed not to determine some abstract question of fault; the object is to recover as large an amount in money damages as possible. We venture to say that far more of these cases are tried because the parties are unable to agree on

the amount of a settlement than because of their disagreement on any other issue. And if juries do not "invariably" decide negligence questions against railroads (cf. *Wilkinson* v. *McCarthy*, 336 U.S. 53, 62) experience teachs us that at least they will resolve most reasonable doubts against the railroads; hence, in most of these cases, the jury will be called upon to consider the dollar amount of their verdict. Hence, any rule which affects the amount of recovery affects the great majority of the cases under the federal act.

The decision of the Court of Appeals in this case, if allowed to stand, results in this: despite specific objection, a trial court may refuse to instruct a jury as to legally applicable limitations upon the amount of recoverable damages without committing error unless the jury, in turn, commits the error of returning a verdict for an "unreasonable" amount. Or to put it another way: the plaintiff may insist upon the giving of instructions more favorable to his case than the law permits, and reap the benefit of a larger verdict thereby gained, so long as the verdict is not so excessive that the trial judge would be duty bound to set it aside anyway. For if one limitation on the amount of the recoverable damages may be ignored, why not other limitations, such as the limitations to "pecuniary benefits" or to present cash value, rather than the aggregate of future loss of earnings or support?

The vice of the holding of the Court of Appeals is not so much that defendants will be called upon to bear a burden of excess liability in the uncertain zone between the amount which a jury would fix under the evidence and proper instructions by the court, and an amount which a court is willing to condemn as unreasonable, but rather that it strikes at the very heart of the system of trial by jury,

which of necessity contemplates that a fair-minded jury will weigh the evidence and decide the issues under proper guidance by the trial judge. *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 13.

If, as the court below said in another case "[t]he way the amounts awarded in verdicts in personal injury cases have been rapidly increasing is a matter of concern to all who are interested in a fair and orderly administration of justice" (*Wetherbee* v. *Elgin, Joliet & Eastern Ry. Co.*, C.A.7, 191 F. 2d 302, 309), that concern should best express itself in an insistence that juries be fairly and adequately instructed upon what are, and what are not, properly recoverable items of damage, rather than to encourage the giving of misleading or incorrect instructions, or to sanction the removal of applicable limitations, leaving the jury to decide the amount of damages any way it sees fit. The fair and orderly administration of justice in this class of cases requires that this Court exercise its supervisory powers, not only to resolve the conflict between the decision below and the decisions of other circuits and of this Court, but to halt at its very inception the dangerous precedent embodied in the ruling below.

II.

The Failure to Instruct the Jury to Consider the Hazardous Nature of Defendant's Employment Was Error.

Upon the question of the prejudicial error in refusing the instruction requested by the defendant as to the effect of decedent's hazardous occupation upon his work expectancy and life expectancy, the decision below is again squarely in conflict with *Thompson* v. *Camp*, C.A. 6, 163 F. 2d 396. In that case the refusal to give the identical

instruction tendered by the defendant was held to be reversible error, the court saying:

> "Appellant's Special Request No. 2 asked that the jury be instructed to also consider decedent's health, that all persons do not live to the age of expectancy, that such is particularly true in the case of hazardous occupations, that they may not work during all of the years of their life, that their earnings may not remain stationary and that the reasonably to be expected contributions may vary or diminsh in the future, and that the jury should not include any amount as contributions which the children would have received after they attained the age of twenty-one, since it is not presumed that they would have received any pecuniary benefits from the deceased thereafter. We think the requested instruction should have been given. Mortality and annuity tables are merely guides to assist the jury in reaching its verdict; they do not furnish rules which the jury is required to follow. The various factors which are present in any particular case making the tables less applicable than they otherwise would be, are also to be considered by the jury. *Vicksburg, etc., R. Co.* v. *Putnam, supra,* 118 U.S. 545, 7 S. Ct. 1, 30 L. Ed. 257; *Coast S. S. Co.* v. *Brady,* 5 Cir., 8 F. 2d 16, 19, 20. The hazardous occupation in which Camp was employed, the possibility of his not working during all the remaining years of his life, the fact that his earning capacity would diminish with increasing age, have a material bearing on the amount of money he reasonably would have made during the remainder of his life and in which the widow and children would share. *United Verde Extension Mining Co.* v. *Koso, supra.*"

Significantly, the Court of Appeals for the Seventh Circuit had referred with apparent approval to this instruction when given at the request of the plaintiff only a short time ago in *Wetherbee* v. *Elgin, J. & E. Ry. Co.,* C.A. 7, 191 F. 2d 302, 311.

The court below held that the giving or refusal of this instruction was within the discretion of the trial court, relying on *Louisville & N. R. Co.* v. *Botts,* C.A. 8, 173 F. 2d, 164. We may note, however, that the court in the *Botts* case, sought to distinguish *Thompson* v. *Camp* upon the ground that the really prejudicial error in that case was the failure to limit damages recoverable on behalf of the minor children to the loss of support during the period of their minority, so that in effect the *Botts* case holds that when the two errors combine their cumulative effect is reversible error. 173 F. 2d 164 at 169. The fallacy of the reasoning of the court below taken from the *Botts* case that the matter of the effect of deceased's hazardous employment upon his life expectancy and his ability to continue to work regularly should be the subject of counsel's argument to the jury rather than of instructions by the court is best illustrated by counsel's argument in this very case. In response to the argument of defendant's counsel that men do not work at hazardous occupations such as that of a railroad switchman beyond the age of 60 or 65, counsel for the plaintiff argued to the jury:

> "• • • Where does counsel get that stuff that railroad men are not working at 70 and 75? The contrary is exactly the truth. Today we have men holding responsible positions at 80 and 85 and 90. What is he talking about? Isn't it common knowledge that men live and work until they are 80 or 90 years of age? How about Bernard Shaw? We have all read about him. He is 94 years of age and had a leg broken and is making a complete recovery. How about Barney Baruch? He is 81. How about Paderewski in days gone by; Sarah Bernhardt? The oldest characters in history lived to be old people and enjoyed life." (R. 218).

This is just the kind of misleading argument which may be expected if the matter of what is and what is not a

proper matter for the jury to consider on the question of damages is to be left to the partisan argument of counsel to the jury rather than to be explained in unbiased instructions of the court. We submit that *Thompson* v. *Camp* lays down the correct rule and that this court should reject the conflicting and fallacious holding below—a ruling whose unsoundness is demonstrated on the face of this very record.

CONCLUSION.

The defendant respectfully submits that the aspect of Federal Employers' Liability Act cases which is becoming of increasing concern in the administration of justice is the very large verdicts which are being returned in these cases as contrasted with recoveries in other fields of negligence and master and servant litigation. As a practical matter, the paramount issue to be decided by the jury is the amount of their verdict in dollars and cents. There is not much room for debate any longer as to what are the applicable principles upon which the question of liability must be decided by the jury. The need to instruct the jury clearly and with fairness to both parties on the damage issues is no less important than the need to instruct them clearly and fairly on the issues upon which liability turns. Instructions on damages which leave the determination of that important issue to a jury without reference to limitations upon the right of recovery or to which factors they may or may not properly take into account in arriving at the amount of their verdict in effect leave the jury without the guidance from the court which they have a right to expect and without the adequate safeguards upon which a defendant is entitled to insist. We think the factor responsible for the constant increase in the verdicts in this class of cases is the failure of trial courts to give ade-

quate and fair guidance to the jury in its instructions. The orderly administration of justice requires that this Court give its attention to this matter to the end that the necessity of properly instructing the jury upon the damage issues shall be emphasized as it deserves. The cure for rapidly increasing verdicts, all out of proportion to the recoveries allowed in other cases and to industrial employees across the nation, is not to be found in giving fewer and more generalized instructions on the damage issue, but by giving accurate, comprehensive and fair instructions which shall direct the attention of the jury to those elements which under the law they may give consideration to and those which they are forbidden to consider. The trial court signally failed to do that in this case and the opinion of the Court of Appeals marks a significant departure from the proper method of instructing juries upon these issues. We respectfully submit that the importance of the conflict presented by the decision in the court below and the decision in the *Thompson* v. *Camp* case warrants review by this Court and correction of the erroneous ruling below before it sets a dangerous and harmful precedent.

Respectfully submitted,

HARLAN L. HACKBERT,
Attorney for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
Petitioner,

vs.

SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,
Respondent.

ANSWER OF THE RESPONDENT TO THE PETITION FOR CERTIORARI.

SUMMARY OF ARGUMENT.

I.

No question of public importance is involved here, and no reason appears why the writ should be granted.

Carter v. *Atlantic and St. Andrews Bay R. Co.*, 338 U. S. 430, 437

Affolder v. *New York C. & St. L. R. Co.*, 339 U.S. 96, 101

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II.

The alleged error in the charge in failing to limit recovery for the children to their minority is of no consequence, since the jury understood, from the argument of counsel on both sides that they must be governed by such limitation, and the verdict is in a very moderate amount.

III.

The instruction on damages which the court refused to give at defendant's behest was erroneous, argumentative, and introduced the element of assumption of risk, which has been eliminated as a defense by the Safety Appliance Act.

Louisville & N. R. Co. v. *Botts,* 173 F. 2d 164

This Court has held that a defendant is not entitled to an instruction that a decedent would not outlive his expectancy.

Louisville & N. R. Co. v. *Holloway,* 246 U. S. 525

ARGUMENT.

I.

No question of public importance is involved here and no reason appears why the writ should be granted.

When this case went into the Court of Appeals, the defendant relied principally on an alleged want of capacity in the plaintiff to bring this suit, and on an alleged lack of jurisdiction on the part of the District Court to hear it. These contentions were set at rest by this Court's decision in *First National Bank* v. *United Air Lines,* 342 U. S. 396, thus leaving the defendant with no question of public interest or general importance to be decided here. On the question of instructions alone, which was decided adversely to the defendant by both the trial court and the Court of Appeals, we submit that this Court would not be justified in granting certiorari. The Court has made its position clear in *Carter* v. *Atlantic and St. Andrews Bay R. Co.,* 338 U.S. 430, 437, *Affolder* v. *New York C. & St. L. R. Co.,* 339 U. S. 96, 101, *Wilkerson* v. *McCarthy,* 336 U. S. 64, and *Moore* v. *C. & O. Ry. Co.,* 340 U. S. 573, 578.

Petitioner has had these questions considered by two competent tribunals; on a question of no public importance this should be sufficient.

Defendant asserts (brief, p. 3) that it contended on the trial that decedent was killed "on an independent movement" when the train in question was being "hauled out of the yard" and not "as the result of the breaking of

a coupler * * *." We wish emphatically to assert that there wasn't a scintilla of evidence in the case to support defendant's contention; nor was there any fact or circumstance appearing in evidence from which the jury could so infer. Decedent, when last seen alive and just a few minutes before the breaking of the coupler in question, told his foreman that he was going down to track 5 to adjust the couplers on the cars on that track which had failed to couple by impact. The undisputed physical facts, *i.e.,* decedent's lantern, the marks on the safety sign and those made by his body when it was dragged to the place where it was found between the rails of that track, prove conclusively that decedent was between the rails of that track adjusting the couplers when he was killed.

II.

The alleged error in the charge in failing to limit recovery for the children to their minority is of no consequence, since the jury fully understood, from the argument of counsel on both sides that they must be governed by such limitation, and the verdict is in a very moderate amount.

The fatal accident to William O'Donnell occurred on January 9, 1946. Suit was filed in behalf of the widow and children on August 29, 1946. This suit was first brought to trial on September 29, 1947. A number of erroneous instructions were given, which resulted in a not guilty verdict. The case was appealed to the Circuit Court of Appeals, which affirmed the judgment of the trial court on December 27, 1948. On December 12, 1949, this Court reversed the lower courts, and remanded the case for another trial. The retrial before the original trial court started September 19, 1950. From an adverse

judgment the defendant appealed. The Court of Appeals affirmed the judgment on November 6, 1951. Now, more than six years after the accident which deprived this widow and children of their support, the defendant is seeking still another trial.

It is urged that the trial court erred in failing to limit the damages recoverable for the children to those sustained during their minority.

This error, if such it be, did not go to the question of liability, but could only have affected the amount of the damages. The first question to consider therefore, is whether the amount of the verdict is excessive.

The decedent left surviving his widow, 42 years of age, and four children, 20, 15, 7 and 6 (Tr. 139, 141, 236). He himself was 45 (Tr. 139, 236). The oldest daughter was married, and no damages were asked for her. Is the sum of $50,000 excessive in view of the fact that the decedent was 45 years of age, and earned approximately $3,600 a year (Tr. 140, 236)? Unless the alleged erroneous charge induced the jury to render an excessive verdict, no error can be predicated on it.

Decedent had before him at least 20 years of useful life as a railroad man. If his wages had never been increased (the scale on this job has since been increased, Tr. 53, and since the trial it has again been increased) he would have earned not less than $72,000 during the remainder of his life. The increased pay which was testified to on the trial amounted to about $1,200 a year (Tr. 53). This would increase his yearly earnings to $4,800, and his earnings for the 20 year period to $96,000. Is an award of $50,000 for the death of a husband who

almost certainly would have brought home $96,000 excessive?

It must not be forgotten that while the damages should be adequate to take care of the widow's needs for years to come, the value of money, and its purchasing power, are constantly declining. There is no reason to suppose that this tendency will be corrected in the foreseeable future. A verdict which is now considered ample may well be hopelessly inadequate within a few years.

Measured by these standards, it seems obvious that the so-called error in the charge was of no consequence, that a verdict for $75,000 could be sustained, had it been rendered.

It would seem that if the defendant were really concerned about the rule for admeasuring the damages, as set forth in the instruction under criticism, it would have asked the court to instruct in accordance with its theory. However, defendant tendered no request to this effect (Tr. 196, 197). Furthermore, no instruction told the jury that they should award damages for the children after they became of age. The damages were limited to the maintenance and support of the children (Tr. 195), *i.e.*, to the obligation of the father to take care of them. That the jury could not have been misled into thinking that the death of the father imposed a burden on the defendant to take care of the children for the rest of their lives becomes apparent, we think, from our disclaimer of any damages for the older daughter who was no longer a dependent. We told the jury, (Tr. 217):

> "We are not asking anything for the older daughter; she is married."

The defendant, in his argument to the jury, at one point stated that the measure of damages was what the decedent might be expected to make for "his wife and children" (Tr. 217) and at another point the "cash value of the loss to the widow and minor children" (Tr. 218). Thus it appears that the jury could have been under no possible misapprehension about it.

The verdict was moderate; the jury obviously were not under the impression that they should award damages for the children after they become of age; the verdict should not be disturbed on this ground.

III.

The instruction on damages which the court refused to give at defendant's behest was erroneous, argumentative, and introduced the element of assumption of risk, which has been eliminated as a defense by the Safety Appliance Act.

This Court has held that a defendant is not entitled to an instruction that a decedent would not outlive his expectancy.

The final argument is made that reversible error was committed when the trial court modified defendant's one-sided, argumentative instruction on certain elements to be considered in assessing damages. Defendant submitted the following request:

> "You are instructed that in estimating the present cash value of any future loss of earnings, you should also consider the fact that all persons do not live to the age of expectancy, and this is particularly true in the case of hazardous occupations such as that of a railroad switchman, that they may not work during all the years of their life; that their earnings

> may not remain stationary and that the reasonably to be expected earnings may vary or diminish in the future." (Tr. 197).

The court modified this request and gave it in the following form:

> "In estimating the present cash value of any future loss of earnings, you may also consider the fact that all persons do not necessarily live to the age of expectancy and that some persons live beyond the age of expectancy; that they may not work during all the years of their life; that their earnings may not remain stationary and that the reasonably to be expected earnings may vary and either diminish or increase in the future." (Tr. 183).

We believe it fundamental that the instructions in any case are the court's, and not those of the parties. It scarcely needs saying that the court is under a duty to be fair to both sides, and should not, by its instructions, show favoritism or argue the case for either party. The instruction requested is nothing more than an argument for the defendant. It tells the jury that many persons do not live to their age of expectancy; it fails to mention that many people outlive their expectancy. It calls attention to the fact that railroad switching is a hazardous occupation, without informing the jury that the defense of assumption of risk has been done away with. It says that railroad men may not work all the years of their life, without mentioning that many do. It states that the earnings of employees may diminish in the future, ignoring the positive evidence in this case that the earnings had increased substantially (Tr. 53). It introduces the defense of assumed risk, although this defense has been abrogated by statute. Had this instruction been given, we believe it would have constituted reversible error.

In *Louisville and N. R. Co.* v. *Botts,* 173 F. 2d 164, it was held that the giving or refusal of the offered instruction was in the discretion of the court. In *Louisville and N. R. Co.* v. *Holloway,* 246 U.S. 525, this Court held that a defendant was not entitled to an instruction that the deceased would not outlive his expectancy.

We believe the Court of Appeals aptly appraised this instruction in its opinion in the instant case, when it said:

> "The instruction as modified and given is also subject to the criticism that it is argumentative, but it at least has the virtue of presenting both sides of the argument." (Tr. 235).

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOSEPH D. RYAN,
LOUIS P. MILLER,
Attorneys for Respondent.

MAY 17 1952
CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1951

No. 696

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
Petitioner,

vs.

SARAH O'DONNELL, Administratrix of the Estate of
WILLIAM O'DONNELL, Deceased,
Respondent.

REPLY BRIEF FOR PETITIONER.

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IN THE

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OCTOBER TERM, A. D. 1951

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VS.

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Respondent.

REPLY BRIEF FOR PETITIONER.

Reply to Respondent's Point I.

Respondent urges that "[o]n the questions of instructions alone, which was decided adversely to the defendant by both the trial court and the Court of Appeals * * * this Court would not be justified in granting certiorari." The answer to this contention is found in the decision of this Court on the former appeal, for this Court granted certiorari and reversed the judgments of both the trial court

and the Court of Appeals *solely* upon the ground that the jury was not properly instructed as to the legal import of the breaking of a coupler. *O'Donnell* v. *Elgin, J. & E. Ry. Co.*, 338 U. S. 384. We submit that determination of the proper measure of damages in a suit under the Federal Employers' Liability Act is of just as grave public importance as the determination of the proper standard of liability; indeed, as we pointed out in the petition for certiorari, the issue is one of much wider application. The issue upon which this Court granted the writ in the former appeal can arise only in that small class of cases in which a coupler separates or breaks without "some purposeful act of control." But the issue of the proper measure of damages for a wrongful death presents itself in *every* case of the death of a railroad employee while engaged in interstate commerce; upon the trial of every such action where minor children survive the decedent the question of how the jury shall be instructed as to the damages recoverable on behalf of the minor children necessarily presents itself. The conflict between the rule laid down in the Sixth and Eighth Circuits and the decision below upon this precise and far-reaching issue raises a conflict so frequently occurring as to require final determination by a decision of this Court.

Reply to Respondent's Point II.

Respondent does not defend the correctness of the instruction given by the trial court on the measure of damage and, thus conceding the error, urges only that "[u]nless the alleged erroneous charge induced the jury to render an excessive verdict, no error can be predicated on it." But just as the Court of Appeals tested the "reasonableness" of the verdict by a standard which the jury

was expressly forbidden to use in arriving at the amount of their verdict, so counsel for respondent test the "excessiveness" of the verdict by a standard equally forbidden to the jury, namely, by multiplying the years of expectancy by the decedent's average gross annual earnings. Recoverable damages are measured not by the decedent's average earnings (*Kansas City etc. Ry. Co.* v. *Lesie,* 238 U. S. 599, 604) but only by the pecuniary benefits which his beneficiaries might have expected from him during his lifetime (*Michigan Central R. R. Co.* v. *Vreeland,* 227 U. S. 59, 70; *American R. R. of Puerto Rico* v. *Didricksen,* 227 U.S. 145, 149) not multiplied by his years of expectancy (*Avance* v. *Thompson,* 387 Ill. 7) but reduced to their present cash value (*Chesapeake & Ohio Ry. Co.* v. *Kelly,* 241 U. S. 485). As the Court of Appeals below recently held in *Wetherbee* v. *Elgin, J. & E. Ry. Co.,* C. A. 7, 191 F. 2d 302, in holding inadmissible in evidence the actuary's calculations of the cash value at the time of trial of decedent's probable future gross earnings:

> "* * * His testimony of his calculations was merely to assist the jury on the matter of computing, and he could not properly be permitted to use as the basis for his calculations, figures or elements which the jury could not use. The only figure the jury was authorized to use to reduce to its present cash value was the pecuniary benefits which the beneficiaries might reasonably have received from decedent. * * *"

The argument of plaintiff's counsel to the jury did not cure the deficiency in the court's instructions; on the contrary, his argument only intensified the error.[1] We

1. In his opening argument to the jury counsel for the plaintiff said:

> "His Honor will tell you in his instructions what elements and items of damages you may and should properly

submit, however that the gravamen of the error below is not whether the verdict is reasonable "when compared with verdicts in similar cases" or excessive when measured against decedent's probable aggregate future gross earnings; the test to be applied and the standard by which the jury should have been instructed was the present cash value of what the decedent might reasonably have been expected to give his widow during her lifetime and his children during their minority. The defendant has been deprived to have this issue of fact decided by a jury.

Reply to Respondent's Point III.

We respectfully submit that nothing in respondent's argument minimizes in the slightest the square-cut conflict between the decision below and the decision of the Court of Appeals for the Sixth Circuit in *Thompson* v. *Camp*, C. A. 6, 163 F. 2d 396.

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consider, and **if you multiply his earnings by his reasonable expectancy of life,** and he might have lived to be much older, and beyond his expectancy, and he might have increased his wages and he might, through energy and ambition, attain a higher position in life where he would double his income which would all go to the benefit of his family." (R. 217)

In his closing argument, after referring to average gross earnings of $3500.00 a year, plaintiff's counsel continued:

"I say to you, Ladies and Gentlemen, that **if you multiply that,** and under a safe investment at 3 per cent, that you should give us everything we sued for. We sued for **$100,000.00** in this case, and if under the theory of the present value of money invested at 3 per cent, it would only give her $3,000.00 a year, a safety security investment. **If you multiply that by his expectancy of 25 or 30 years** it would make a sum around that amount for the lifetime of this man." (R. 219) (Emphasis supplied.)

Conclusion.

We respectfully submit that the conflict between the decisions relied upon by petitioner and by respondent in the several courts of appeal upon so grave an issue as the proper measure of damages in an action for wrongful death under the Federal Employers' Liability Act presents proper issues which this Court should review by certiorari.

Respectfully submitted,

HARLAN L. HACKBERT,
Attorney for Petitioner.